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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-23

JOSEPH E. FLYNN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Joseph E. Flynn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 30, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on May 30, 1973. This petition for

certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the action of the trial Judge in cross-examining witnesses, interposing objections, commenting on the credibility of the defendant and erroneously stating the applicable law deprived the defendant of a fair trial.

2. Whether the erroneous instruction of the trial Judge concerning the issue of charitable contributions constitutes reversible error.

Statutory Provisions Involved

United States Code, Title 26:

Section 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Statement of the Case

On March 28, 1969 the Grand Jury returned an indictment against the Defendant, Joseph E. Flynn, in three (3) counts charging the defendant with tax evasion in the years 1962, 1963 and 1964 in violation of 26 U.S.C. Section 7201.

The defendant pleaded not guilty and on Septemeber 14, 1971, trial commenced before Judge Ford and a Jury and continued through October 12, 1971. At the trial the principal thrust of the Government's case was based upon certain deductions alleged as improperly taken.

On October 12, 1971, the Jury returned a verdict finding the defendant guilty on Counts 1, 2 and 3 of the indictment and the case was continued for disposition to October 27, 1971.

At the time the Jury returned its verdict, the defendant, filed timely motions for a directed verdict of acquittal, and for a new trial. Said motions were denied by the Court. On November 3, 1971 the defendant was sentenced to be imprisoned for a term of three (3) months and to pay a fine of $5,000.00 on each count with a direction that the prison sentences on all three (3) counts were to run concurrently and the defendant was to pay a total fine in the sum of $15,000.00.

On November 10, 1971, the defendant filed a timely notice of appeal to the Court of Appeals.

On May 30, 1973, the judgment of the District Court was affirmed by the Court of Appeals for the First Circuit. In the course of its opinion the Court of Appeals held, inter alia, that although the trial Judge's charge to the jury on the issue of charitable deductions was clear error, it was "de minimis" and did not affect a fair trial. See p. 14 of Appendix hereto.

Defendant in his brief (citing fifty-five (55) instances from the transcript) had also argued that the trial Judge in cross-examining witnesses, interposing objections, commenting on the credibility of the defendant and erroneously stating the applicable law had effectively deprived him of a fair trial. The Court of Appeals dealt briefly with this issue at p. 5 of its opinion:

> Finally, defendant complains that the court, by its comments, deprived him of a fair trial. A number of the comments, made in the course of the testimony, related to actions which defendant himself conceded. Even though fair, *some were unnecessary, and we*

may agree that overemphasis could have been prejudicial. Also, on occasion, the court indicated skepticism of defendant's testimony. Again, this was highly understandable, but unnecessary. Having in mind that the trial lasted sixteen days, however, the number of these comments was not so large as to be prejudicial. Cf. *Glasser* v. *United States*, 1942, 315 U.S. 60, 83; *Gordon* v. *United States*, 5 Cir., 1971, 438 F.2d 858, 862-65, cert. denied 404 U.S. 828. Under the federal practice a court need not be as inscrutable as the Sphinx. See *United States* v. *Gaines*, 3 Cir., 1971, 450 F.2d 186, 188-90 (Emphasis Supplied) (See p. 14 of Appendix hereto).

Reason for Granting the Writ

CERTIORARI SHOULD BE GRANTED FOR THE REASONS THAT THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS, MISAPPLIES DECISIONS OF THIS COURT AND INVOLVES SIGNIFICANT QUESTIONS CONCERNING THE ROLE OF THE TRIAL JUDGE IN FEDERAL CRIMINAL TRIALS.

Quercia v. *United States*, 289 U.S. 466 involved a grant of certiorari to review a decision of the First Circuit. The principal issue concerned the question of whether or not the trial Judge's instructions exceeded the bounds of fair comment and constituted prejudicial error. This Court in *Quercia* at 469 defined the role of the trial Judge as follows:

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it

> necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he make it clear to the jury that all matters of fact are submitted to their determination.

The opinion at p. 470 went on to set out some of the limitations on this role:

> This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with diference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided".

This Court reversed the judgment in *Quercia* finding that the statements of the trial Judge were of such a nature as to "preclude a fair and dispassionate consideration of the evidence." *Quercia, supra* at 472.

Glasser v. *United States*, 315 U.S. 60 (relied upon by the Court of Appeals in its opinion; see p. 14 of the Appendix) in citing *Quercia, supra* spoke of the trial Judge's responsibility:

> Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding.

It is submitted that the Court of Appeals in its opinion does not give proper recognition to the meaning and spirit of the opinions of this Court in *Quercia* and *Glasser, supra*. It finds that some of the Judge's comments were fair, but unnecessary, while recogizing that over-emphasis could have been prejudicial.

In the critical area dealing with the defendant's credibility, the opinion finds that the trial Judge's indicating skepticism of the defendant's testimony was understandable, but unnecessary. Finally the opinion disposes of the issue on the quantitative basis that the number of prejudicial comments was not sufficient to be prejudicial.

In *United States* v. *Switzer*, 252 F.2d 139, 144 the Court stated as follows:

> A trial Judge has a duty to elicit facts necessary to a clear presentation of the issues . . . but he must maintain impartiality and a courtroom atmosphere in which guilt or innocence may be solely and fairly tested. (See also United States v. D'Anna, 71-2 U.S. T.C. Paragraph 9705).

Throughout the course of the trial, the trial Judge consistently interposed objections to questions of defense counsel even when no objection was made by the Government's attorney. He conducted extensive cross-examination of several of the witnesses including the defendant. Finally, he made innumerable comments, erroneous state-

ments of law and prejudicial and disparaging remarks concerning evidence and testimony adduced by the defendant. The record and transcript is replete with instances of the above.

Bursten v. *United States,* 395 F.2d 979, 983 (5th, 1968) involved an appeal from a conviction for tax evasion. In reversing, the Court stated as its principal basis the prejudicial comments and conduct of the trial Judge constituting plain, manifest error.

As the Court states at 983:

> It is well known, as a matter of judicial notice that juries are highly sensitive to every utterance that the trial Judge, the trial arbiter and that some comments made so highly prejudicial that even a strong admonition by the Judge to the jury, that they are not bound by the Judge's views will not cure the error.

It is submitted that the Court of Appeals in the instant case in suggesting that "a Court need not be as inscrutable as the Sphinx" (p. 14 of the Appendix) fails to give proper effect to decisions of the Court recognizing high standards of judicial impartiality, the sensitivity of Jurors and the right of a defendant to a fair trial.

In addition to the above, the Court of Appeals found that the "principal charges against defendant related to improper deductions" (See p. 11 of the Appendix). The Court also found error, as defendant had argued, with respect to the trial Judge's charge on the issue of charitable deductions, holding however that the error was de minimis.

The erroneous instruction of the trial Judge in this particular was a matter of profound impact in the context of this case. First of all, with respect to the three (3) years in issue, substantial charitable contributions were deducted by the defendant in each year. In 1962, the defendant's charitable contributions totaled $5,853.00, in

1963 the charitable contributions totaled $5,153.50 and in 1964 charitable contributions totaled $5,249.00.

It should be noted that at the time the Government on cross-examination sought to inquire into certain of the charitable contributions an objection was raised by the defendant on the grounds that the charitable contributions were not an issue in the criminal case. The Government maintained that while these items were not an issue per se in the criminal case, the purpose of inquiring into them was to show criminal intent.

It is in this posture that the Court must consider the correctness of the trial Judge's instruction on the issue of charitable contributions raised by the defendant at the trial. The contributions deducted on the returns for the years in issue exceed $16,000.00. The jury was thus placed in the position of finding that the defendant had failed to bring forward evidence of exemption certificates for any of these contributions and therefore could have found that they were improperly taken.

Clearly this could have had a very profound impact on the defendant's case and was thus prejudicial. This was an unusual tax evasion case insofar as the Government relied almost entirely on improper deductions as opposed to the usual method of unreported income. Recognizing this fact, it is difficult to see how the erroneous instruction could be classified as "de minimis".

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 71-1350

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOSEPH E. FLYNN,
DEFENDANT, APPELLANT.

JUDGMENT
Entered May 30, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA E. GALLUP
Clerk

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 71-1350

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSEPH E. FLYNN,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge,*
ALDRICH and CAMPBELL, *Circuit Judges.*

John M. Doukas, with whom *Robert M. Harrington* was on brief, for appellant.

Wayne B. Hollingsworth, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

May 30, 1973

ALDRICH, *Senior Circuit Judge.* In this appeal from convictions under a three-count indictment charging the filing of fraudulent income tax returns for the years 1962-64, 26 U.S.C. § 7201, we are faced at the outset with a question of procedure — whether to discuss points having a possibility of merit and omit the rest, or to write more fully. The conspicuous falsity of defendant's testimony, coupled with the briefing of many worthless matters requiring extensive checking, leads us to comment.

Defendant's initial complaint is to the court's failure to charge that there was no unreported income. The government established that defendant received, or was credited

with, some ten times the amount of savings bank interest he specifically reported. Defendant claimed that the balance was mistakenly reported as an unitemized figure included in his professional income under Schedule C. He introduced in support, as an exhibit, a sheet of paper that he testified was the original, as distinguished from other papers of which he had only copies, of work notes showing the make-up of that figure for the year 1962. In response, the government produced the manufacturer of the paper, who testified that it was made in 1971. Defendant than testified that the original "was pretty well used up and I thought it was neater to do it on this." Why, after tax charges had been brought, he had thought it neater to dispose of the original, let alone to misrepresent, was not explained. We note, in passing, that the same procedure was repeated in another area.

In addition, defendant took the position that the bank interest did not have to be reported in any event, citing (admittedly as to the first two years only), Internal Revenue Service regulations that interest accruing on certain types of restricted cooperative shares did not have to be currently reported. While defendant showed that he had owned cooperative bank shares, he did not show that any were restricted. Indeed, the only possibly relevant testimony on the point suggested they were not. On this record defendant objects to the court's refusal to charge that there was no basis for the jury to find any unreported income. This, what we can best call inexcusable nonsense, sets the stage for much that we are asked to deal with on this appeal.

The principal charges against defendant related to improper deductions. Defendant was a practicing surgeon. Financially successful, he maintained a stable of horses. By one manner or another he sought to charge some of the expense to the government after the stable had been dis-

allowed as a business. Under the guise of deductions in connection with his medical practice, he claimed as "medical assistance" bills which, upon investigation by the IRS, proved to be for veterinarians, a blacksmith, and a horse-van driver and stable-helper. "Medical supplies" proved to be riding clothes for his family; also jewelry, furs, rugs, flowers, liquor, and other extraneous matters. A photograph of a home refrigerator with the door open, introduced to show medicines, in support of his claim that he practiced from his home, proved, upon examination with a magnifying glass, to show veterinary medicines.[1]

Another device was to claim the same expense twice. Thus defendant's working papers showed that substantial payments for gas, oil, and repairs were taken once under "Auto Repairs," and then again under "Fuel, Light and Power."

Confronted with multiple examples, defendant's trial strategy was, (1) to deny willfulness; (2) to claim that the deductions were legitimate, and merely improperly labelled. For this latter he asserted at one point that his horse and farm expenses were charitable deductions because his horses participated in charitable shows, and later that he had been in the business of "improving" horses, despite the fact that he had, in three years, made only one sale, on which he showed no profit. Other "charitable" deductions included support money to an indigent friend, manifestly not allowable. *Tressler* v. *Commissioner,* 4 Cir., 1953, 206 F.2d 538, 542; *Tilles* v. *Commissioner,* 1938, 38 B.T.A. 545, 549-51, *aff'd,* 8 Cir., 1940, 113 F.2d 967, *cert. denied* 311 U.S. 703. In addition, he sought to claim at trial casualty losses to his horses, largely due to illness or

[1] Confronted with this, defendant responded that he gave veterinary medicines to his human patients. It is some fifty years since the writer saw advertising for universal elixirs, "Good for Man and Beast." *See* G. Allen Foster, Advertising, Ancient Market Place to Television (1967).

disease, clearly not allowable. *See Appleman* v. *United States,* 7 Cir., 1964, 338 F.2d 729, 731-32, *cert. denied* 380 U.S. 956; Rev. Rul. 61-216, 1961-2 Cum. Bull. 134. On this appeal defendant criticizes the instruction on casualty losses given the jury. There was no error.

We do not pause over defendant's objections to the introduction of his 1961 return and certain other evidence on the subject of willfulness. Again, there was no error.[2] *Hamman* v. *United States,* 9 Cir., 1965, 340 F.2d 145, 149-50, *cert. denied* 380 U.S. 977; *Marienfeld* v. *United States,* 8 Cir., 1954, 214 F.2d 632, 638-39, *cert. denied* 348 U.S. 865. However, an objection of some initial merit concerns charts offered by defendant to show that in fact he had not underpaid his tax — a defense regardless of willful misstatements in the returns. *See United States* v. *Moody,* 6 Cir., 1964, 339 F.2d 161. *Compare* 26 U.S.C. § 7206. Careful analysis shows the charts to have been fallacious, as containing items not supported by the evidence even viewed most favorably to the defendant. *See McGarry* v. *United States,* 1 Cir., 1967, 388 F.2d 862, 868, *cert. denied* 394 U.S. 921; *Flemister* v. *United States,* 5 Cir., 1958, 260 F.2d 513, 517. In part the preparer drew on cancelled checks which in many instances were not linked to particular goods or services received. In at least one instance the full amount was claimed when only part was deductible. Quite apart from this, we find the charts sufficiently difficult to interpret that the court, in its discretion, might well have found them more troublesome to the jury than helpful. *See McGarry,* ante; *United States* v. *Ellenbogen,* 2 Cir., 1966, 365 F.2d 982, 988, *cert. denied* 386 U.S. 923.

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[2] Extensive argument at trial and in the brief revolved around certain "civil" charges to which defendant objected. We have reviewed this at length and find no prejudicial error. Much of the claimed confusion was attributable to defendant himself.

There was an error in connection with charitable deductions. Most of defendant's contributions were to Catholic organizations, and at one point the court allowed a contribution to a Catholic school without any evidence supporting the charitable status of the school. At another place, however, the court did indicate that, to be qualified, a charity must hold an exemption certificate. This was not so. We agree with the government, however, that on the basis on which it tried its case this error could affect only a relatively small amount of the charitable deductions, and viewed in the large, the error was de minimis. The Court's recent reaffirmation, that a defendant "is entitled to a fair trial, but not a perfect one," *Brown* v. *United States*, 4/15/73, U.S. , is appropriate.

Finally, defendant complains that the court, by its comments, deprived him of a fair trial. A number of the comments, made in the course of the testimony, related to actions which defendant himself conceded. Even though fair, some were unnecessary, and we may agree that overemphasis could have been prejudicial. Also, on occasion, the court indicated skepticism of defendant's testimony. Again, this was highly understandable, but unnecessary. Having in mind that the trial lasted sixteen days, however, the number of these comments was not so large as to be prejudicial. *Cf. Glasser* v. *United States*, 1942, 315 U.S. 60, 83; *Gordon* v. *United States*, 5 Cir., 1971, 438 F.2d 858, 862-65, *cert. denied* 404 U.S. 828. Under the federal practice a court need not be as inscrutable as the Sphinx. *See United States* v. *Gaines*, 3 Cir., 1971, 450 F.2d 186, 188-90.

Defendant's several remaining points have been fully considered. They are meritless.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-23

JOSEPH E. FLYNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on three counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. 7201. He was fined a total of $15,000 and sentenced to three months' imprisonment. The court of appeals affirmed (Pet. App. B). Petitioner here contends that the conduct of the trial judge was prejudicial and that a concededly erroneous charge respecting the deductibility of charitable contributions constituted reversible error.

As the opinion of the court of appeals sets forth (Pet. App. B, pp. 10-13), the evidence showed that petitioner understated his income for the years in question by excluding certain interest income and by taking several improper deductions. In addition to other deductions that were clearly improper, petitioner on his

return claimed several deductions he labeled as "charitable" even though they consisted of gifts to a friend and payments to a school which his children attended. The government did not challenge petitioner's charitable deductions as part of its proof of tax evasion. However, their propriety was questioned on cross-examination.

1. Petitioner contends (Pet. 4-7) that he was deprived of a fair trial by allegedly prejudicial comments by the trial judge. However, petitioner fails to identify any such comment with specificity. See Rule 23(1)(e) of the Rules of this Court. In the court of appeals, petitioner made only generalized allegations of prejudice, which were accompanied by a list of transcript citations. After reviewing the transcript, the court of appeals concluded (Pet. App. B, p. 14) that the trial judge's unfavorable comments, although "unnecessary," were nevertheless "fair" in context and in any event not so numerous "as to be prejudicial." This issue warrants no further review.

2. With respect to the charitable contributions, the trial judge instructed the jury that only contributions to organizations which have received an exemption ruling are deductible. This charge was erroneous—contributions to charitable organizations may in some cases be deducted even if a ruling has not been obtained—but the error was harmless. Petitioner's deductions for charitable contributions were not the basis for his criminal prosecution. His contention is that the trial court's instruction cast doubt upon the validity of those deductions and thereby strengthened the government's showing of willfulness. But of the two charitable deductions challenged by the government on cross-examination, petitioner's counsel conceded that one—the gift to a friend—was not proper (7 R. 44-45; 9 R. 26),[1] and the existence of an exemption ruling was not

[1] "R." refers to the reporter's multi-volume transcript of trial proceedings.

at issue with respect to the validity of the other—the payments to petitioner's children's school. Thus the jury's verdict could not have been affected by the slight error in the court's instruction.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[2] Contrary to the recitation of facts in the opinion below (Pet. App. 3, p. 12), petitioner did not claim at trial that certain horse-raising and farming expenses were deductible as charitable expenses. He did testify that his horses participated in charitable shows (10 R. 24-27) but he admitted that this participation was for the purpose of winning prize money (13 R. 115-119). The court's instructions concerning charitable contributions therefore did not affect the theory of petitioner's defense at trial.

DOJ-1973-08